

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81ST DOLPHIN PARKING**

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

**FIRST AMENDED ANSWER OF RESPONDENTS THE BOARD OF TRUSTEES OF
THE GALVESTON WHARVES AND THE GALVESTON PORT FACILITIES
CORPORATION**

COME NOW The Board of Trustees of the Galveston Wharves (“Wharves”) and the Galveston Port Facilities Corporation (“GPFC”), respondents in the above entitled and numbered cause, by and through their attorneys, Anthony P. Brown and Wm. Hulse Wagner, as and for their answer to Complainants’ First Amended Complaint herein respectfully allege and state as follows:

I. ADMISSIONS & DENIALS

1. Answering Paragraph I.A. of Complainants’ First Amended Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.
2. Answering Paragraph I.B. of Complainants’ First Amended Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.

3. Answering Paragraph I.C. of Complainants' First Amended Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.
4. Respondent Wharves admits that it publishes rules, regulations and tariffs for the Port of Galveston. Respondents deny the remaining allegations in Paragraph II.A. of Complainants' First Amended Complaint.
5. Respondent GPFC admits that is a nonprofit corporation organized and existing under the laws of the State of Texas and was incorporated on June 17, 2002. Respondents deny the remaining allegations in Paragraph II.B. of Complainants' First Amended Complaint.
6. Respondents deny the allegations in Paragraph II.C. of Complainants' First Amended Complaint.
7. Respondents deny the allegations in Paragraph III.A. of Complainants' First Amended Complaint.
8. Respondents deny the allegations in Paragraph III.B. of Complainants' First Amended Complaint.
9. Respondents admit the allegations in Paragraph IV.A. of Complainants' First Amended Complaint.
10. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations regarding Complainants' creation and business dealings. Respondents deny Complainants are a more economic and convenient alternative to parking within the Port of Galveston facility in Paragraph IV.B. of Complainants' First Amended Complaint.

11. Respondents admit the allegations in Paragraph IV.C. pertaining to the number of covered parking spaces offered on a first come first served basis but deny the remaining allegations within said paragraph.
12. Respondents admit the allegations in Paragraph IV.D. of Complainants' First Amended Complaint.
13. Respondents admit that the Wharves promulgated the Tariff and the Access Fees included therein. Respondents deny the remaining allegations within Paragraph IV.E. of Complainants' First Amended Complaint.
14. Respondents admit the allegations in Paragraph IV.F. of Complainants' First Amended Complaint.
15. Respondents admit the allegations in Paragraph IV.G. of Complainants' First Amended Complaint.
16. Respondents admit the allegations in Paragraph IV.H. that the Tariff provided a methodology for determining annual increases to monthly Access Fees charged to Off-Port Parking Users based on consumer price index growth but deny the implication that the Board's election not to increase the monthly Access Fee in 2011, 2012, and 2013 constituted a failure of implementation.
17. Respondents admit the allegations in Paragraph IV.I. of Complainants' First Amended Complaint.
18. Respondents admit the allegations in Paragraph IV.J. of Complainants' First Amended Complaint.
19. Respondents deny the allegations in Paragraph IV.K. of Complainants' First Amended Complaint.

20. Respondents deny the allegations in Paragraph IV.L. of Complainants' First Amended Complaint.
21. Respondents deny the allegations in Paragraph IV.M. of Complainants' First Amended Complaint.
22. Respondents admit the allegations in Paragraph IV.N. of Complainants' First Amended Complaint.
23. Respondents deny the allegations in Paragraph IV.O. of Complainants' First Amended Complaint.
24. Respondents deny the allegations in Paragraph IV.P. of Complainants' First Amended Complaint.
25. Respondents admit the allegations regarding the amounts charged to "Airport Shuttles" and for "Per Trip Access Fees" set out in Paragraph IV.Q. of Complainants' First Amended Complaint. Respondents deny the remaining the allegations in Paragraph IV.Q. of Complainants' First Amended Complaint.
26. Respondents lack sufficient knowledge or information to form a belief about the truth of the statements regarding actual occupancy of Complainants' lots in Paragraph IV.R. of Complainants' First Amended Complaint. Respondents deny the remaining allegations set out in Paragraph IV.R. of Complainants' First Amended Complaint.
27. Respondents deny that the allegations in Paragraph IV.S. are contained in Complainants' Exhibit F. To the extent Complainants' allegations apply to Complainants' Exhibit E, Respondents believe that the transcript speaks for itself and otherwise deny Complainants' spin and mischaracterization of the statements made in said Exhibit and in in Paragraph IV.S. of Complainants' Complaint.

28. Respondents admit that the Wharves approved an increase of the Access Fees to become effective July 1, 2014 but otherwise deny the allegations contained in Paragraph IV.T. of Complainants' First Amended Complaint.
29. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations contained in Paragraph IV.U. of Complainants' First Amended Complaint.
30. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations regarding market impact studies and analysis contained in Paragraph IV.V. of Complainants' First Amended Complaint because the term "market impact study or analysis" is not defined. Respondents otherwise deny the remaining allegations contained in Paragraph IV.V. of Complainants' First Amended Complaint.
31. Respondents admit the allegations in Paragraph IV.W. of Complainants' First Amended Complaint.
32. Respondents deny the allegations in Paragraph IV.X. of Complainants' First Amended Complaint.
33. Respondents admit that Complainants' representatives made the statements contained in Paragraph IV.Y of Complainants' First Amended Complaint. Respondents deny the remaining allegations contained in Paragraph IV.Y of Complainants' First Amended Complaint.
34. Respondents deny the allegations in Paragraph IV.Z. of the Complainants' First Amended Complaint.
35. Answering Paragraph IV.AA. of Complainants' First Amended Complaint, Respondents assert that the Tariff provisions speak for themselves. Respondents deny the remaining allegations contained in Paragraph IV.AA. of Complainants' First Amended Complaint.

36. Respondents lack sufficient knowledge or information to form a belief about the truth of Paragraph IV.BB. of Complainants' First Amended Complaint.
37. Respondents deny the allegations in Paragraph IV.CC of Complainants' First Amended Complaint. Additionally, Respondents assert that Complainants are estopped from asserting the allegations contained therein since Complainants initially requested the allegedly disparate treatment described in said paragraph.
38. Answering Paragraph IV.DD. of Complainants' First Amended Complaint, Respondents admit that Complainants and Discount Parking paid Access Fees as Off-Port Parking Users. Respondents deny the remaining allegations contained in Paragraph IV.DD. of Complainants' First Amended Complaint.
39. Answering Paragraph IV.EE. of Complainants' First Amended Complaint, Respondents admit that the Tariff does not impose Access Fees upon pedestrians. Respondents deny the remaining allegations in said paragraph, and Complainants' mischaracterization of the facts set out therein.
40. Answering Paragraph IV.FF. of Complainants' First Amended Complaint, Respondents admit that the Tariff does not impose Access Fees upon pedestrians. Respondents deny the remaining allegations and Complainants' mischaracterization of the facts in Paragraph IV.FF. of Complainants' First Amended Complaint.
41. Respondents deny the allegations contained in Paragraph IV.GG. of Complainants' First Amended Complaint.
42. Respondents admit that the Wharves Board approved a change of the 2014 Tariff to take effect beginning October 1, 2014. Respondents deny the remaining allegations and

Complainants' mischaracterization of the facts in Paragraph IV. HH. of Complainants' First Amended Complaint.

43. Respondents deny the allegations contained in Paragraph IV. II of Complainants' First Amended Complaint.

44. Respondents deny the allegations contained in Paragraph IV. JJ. of Complainants' First Amended Complaint.

45. Respondents deny the allegations contained in Paragraph IV. KK. of Complainants' First Amended Complaint.

46. Respondents deny the allegations contained in Paragraph IV. LL. of Complainants' First Amended Complaint.

47. Respondents deny the allegations contained in Paragraph IV. MM. of Complainants' First Amended Complaint.

48. Respondents deny the allegations contained in Paragraph IV. NN. of Complainants' First Amended Complaint.

49. Complainants' causes of action for violations of 46 U.S.C. § 41002(c) and 46 U.S.C. § 41106 (3) were previously dismissed by this Commission in its Order on Pending Motions and Partial Dismissal, served November 21, 2014. Nonetheless, Respondents deny each and every alleged violation of the Shipping Act of 1984 set out in Paragraph V. A. of Complainants' First Amended Complaint.

50. Respondents deny the allegations set out in Paragraph V. B. of Complainants' First Amended Complaint.

51. Respondents deny the allegations set out in Paragraph V. C. of Complainants' First Amended Complaint.

52. Respondents deny the allegations set out in Paragraph V.D. of Complainants' First Amended Complaint.
53. Complainants' cause of action for violations of 46 U.S.C. § 41106(3) was previously dismissed by this Commission in its Order on Pending Motions and Partial Dismissal, served November 21, 2014. Nonetheless, Respondents' deny the alleged violations set out Paragraph V. E. of Complainants' First Amended Complaint.
54. Respondents deny the alleged violations set out in Paragraph V. F. of Complainants' First Amended Complaint.
55. Complainants' causes of action for violations of 46 U.S.C. § 41002(c) and 46 U.S.C. § 41106(3) were previously dismissed by this Commission in its Order on Pending Motions and Partial Dismissal, served November 21, 2014. Nonetheless, Respondents deny each and every alleged violation of the Shipping Act of 1984 set out in Paragraph V. G. of Complainants' First Amended Complaint.
56. Respondents deny the allegations set out in Paragraph VI.A. of Complainants' First Amended Complaint.
57. Respondents deny that Complainants are entitled to the relief set out in Section VII ("Prayer") of their complaint.
58. Respondents agree with Complainants' request that the Hearing on this matter take place in Galveston, Texas, as requested in Section VIII of Plaintiffs' complaint.

II. DEFENSES & AFFIRMATIVE DEFENSES

Respondents hereby assert the following affirmative defenses:

1. Lack of Subject Matter Jurisdiction. Respondents allege that the FMC lacks subject matter jurisdiction over the Complaint as it pertains to Respondent GPFC because GPFC is not a marine terminal operator as defined by 46 U.S.C.A. § 40102(14). Rather, it is a mere agent of a marine terminal operator. The Shipping Act does not authorize the FMC to regulate agents. *Landstar Express America, Inc.*, 569 F. 3rd 493 (D.C. Cir. 2009). Additionally, Respondents allege that the FMC lacks subject matter jurisdiction over the Complaint as it pertains to Respondent Wharves because the claims made the basis of this complaint are not sufficiently related to marine terminal operations so as to create jurisdiction under the Shipping Act.
2. Failure to State a Claim. Respondents allege Complainants' failure to state a plausible claim for relief. Complainants have alleged no facts sufficient to support a reasonable inference that the Complainants are entitled to any relief the FMC can grant.
3. Improper reliance on 46 U.S.C.A. § 41102(c). Complainants claim that Respondents violated Section 41102(c) by reason of "unjust, unreasonable and unlawful practices" is unfounded. This section applies only to regulations and practices "related to or connected with receiving, handling, storing, or delivering *property*." 46 U.S.C.A. § 41102(c), emphasis added. The Access Fees made the basis of Complainants' action are assessed against Off-Port Parking Users who wish "to pick up or drop off *passengers* within a terminal complex." (Page 3-J, Exhibit C to Complainants' Complaint, emphasis added).
4. Sovereign Immunity. Respondents are immune from suit, because Wharves and GPFC are governmental entities whose activities are governmental functions. *Lake Charles Harbor & Terminal Dist. v. Board of Trustees of the Galveston Wharves*, 62

S.W.3d 237, 246 (Tex. App. - Houston [14th Dist.] 2001, pet. denied) (“The [Galveston] Wharves is a governmental unit and as such is protected by the doctrine of sovereign immunity.”). GPFC is a “local government corporation,” established pursuant to Tex. Transp. Code Ann. §431.101 *et seq.* As such, it is a governmental unit whose operations are governmental, not proprietary, functions. *Id.* at §431.108; *see also* Op. Tex. Att’y Gen No. JC-0335 (2001). Thus, Wharves and GPFC are both immune from suit. *MBP Corp. v. Board of Trustees of the Galveston Wharves*, 297 S.W.2d 483 (Tex. App. – Houston [14th Dist.] 2009, no pet.).

5. Statute of Limitations. Complainants’ claims for reparations in relation any alleged disparate treatment under the previously enacted 2006 Tariff are barred by the applicable three-year statute of limitations. 46 U.S.C. 41301(a).
6. Laches. Complainants’ claims in relation to any alleged disparate treatment under the previously enacted 2006 Tariff are barred by the equitable doctrine of laches. *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990).
7. Ratification. Complainants’ claims are barred because of ratification.
8. Estoppel. Complainants are legally and/or equitably estopped from asserting claims based on allegations of disparate treatment from other entities paying access fees calculated on a “per-trip” basis, because Complainants specifically requested that Wharves change the Tariff to provide for the current methodology. Had they not requested it, that methodology would likely not have been put into place.
9. Waiver. Complainants have waived their claims under the Shipping Act of 1984 based on allegations of disparate treatment from other entities paying access fees calculated on a “per-trip” basis, because Complainants specifically requested that

Wharves change the Tariff to provide for the current methodology. Had they not requested it, that methodology would likely not have been put into place.

10. No Damages. Complainants have not sustained any damages as a result of the assessment of Access Fees by Respondents under the current or previous tariffs. In the contrary, the alleged disparate treatment actually resulted in a savings to Complainants.
11. Pleading further, Respondents would show that Complainants were not treated unfairly in comparison to local hoteliers and taxicab operators, because local hoteliers and taxicab operators did not, and do not, operate paid parking lots.
12. Pleading further, Respondents would show that Complainants have not been treated unfairly in comparison to other parking lot operators whose customers walk from the parking lots to the cruise terminal facility, because the parking lot owners do not enter onto Port property in connection with their operations, and thus cannot be charged an Access Fee.
13. Pleading further, Respondents would show that Complainants have not been treated unfairly by requiring them to access Port property at the entrance they complain of, because this actually benefits them by allowing them to drop off their passengers at a more convenient location.
14. Pleading further, Respondents would show that Complainants complaints regarding where they access Port property are under the jurisdiction of the U.S. Coast Guard, due to the security issues involved.

III. NEED FOR HEARING

1. Respondents agree that a hearing is appropriate in this matter, and join in the request that the Hearing take place in Galveston, Texas.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Complainant in this proceeding be resolved as follows:

1. The Complainants take nothing of their Complaint on file herein;
2. That the Commission award Respondents reasonable attorney's fees incurred in the defense of Complainants' action against these answering Respondents;
3. For costs and disbursements incurred herein;
4. For such other and further relief as the Commission may deem just and proper.
5. For the Complaint to be dismissed as to both Respondents.

Dated: December 5, 2014

Respectfully submitted,

McLeod, Alexander, Powel & Apffel, P.C.

By: 

Anthony P. Brown

Texas State Bar No. 03091300

Tex. S.D. Id No. 7185

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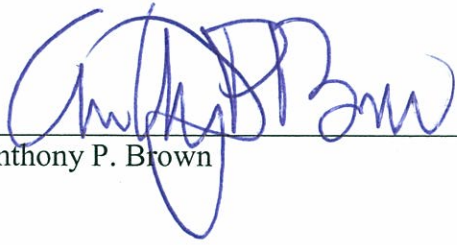
Fax: 409-762-1155

ATTORNEYS FOR THE BOARD OF TRUSTEES
OF THE GALVESTON WHARVES

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of December, 2014, a copy of the foregoing document was served by electronic mail and certified United States mail, return receipt requested on Complainants' counsel of record.

Douglas T. Gilman
Gilman & Allison, LLP
2005 Cullen Blvd.
Pearland, Texas 77581



Anthony P. Brown

VERIFICATION OF FIRST AMENDED ANSWER

STATE OF TEXAS §
 §
COUNTY OF GALVESTON §

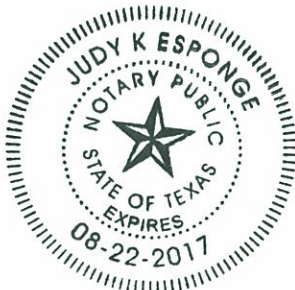
BEFORE ME, the undersigned notary on this day, personally appeared Michael Mierzwa, who known to me and being duly sworn, declared as follows:

1. "I am over either (18) years of age and fully competent and able to make this Verification.
2. I am employed as the Port Director for the Board of Trustees of The Galveston Wharves, a Respondent in this matter. Additionally, I am the President of The Galveston Port Facilities Corporation, a Respondent in this matter.
3. I have read the foregoing First Amended Answer and the facts stated therein, and believe them to be true and correct."



Michael Mierzwa

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned Notary on this 5th day of December, 2014, by Michael Mierzwa, to certify which witness my hand and official seal.





Notary Public, State of Texas